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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| PORRAZZO CORPORATION,<br>Cross-Complainant and Appellant,<br>v.<br>MONTAN CORPORATION et al.,<br>Cross-Defendants and Appellants. | E031969<br>(Super.Ct.No. RIC 321468)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

Wallace & Madden and John B. Wallace for Cross-Defendants and Appellants.

Hunt, Ortmann, Blasco, Palffy & Rossell, Inc., Laurence P. Lubka and Matthew S. Shorr for Cross-Complainant and Appellant.

## 1. Introduction

Barton[1] appeals a judgment for money in favor of Porrazzo.[2] Porrazzo cross-

[1] Barton is the collective name for Barton Properties, Inc. and Montan Corporation.

appeals seeking penalties for failure to make prompt payment. We affirm the judgment.

2. Factual and Procedural Background

In May 1998, Barton hired Porrazzo to perform construction services for a real estate project owned by Barton called Via Escalante. One contract was for street subgrading work at a cost "not to exceed $16,000." The second contract was to install curb gutters and street paving for $145, 241.75. The grading contract provided the work was to be performed as soon as possible. The curb and paving contract did not provide a completion date.

Porrazzo started work in June 1998. Porrazzo hired La Cresta Engineering, a licensed grading contractor, to perform the grading work. Barton contends that Porrazzo's work was defective and had to be redone, causing delay. Barton asserts the work was supposed to have been completed by mid-July 1998 but was not finished until mid-November 1998, after the work did not pass county inspection. Porrazzo contends Barton misrepresented the scope of the work and that Barton refused to approve a change order for additional work for the subgrading. Porrazzo admits the work failed inspection but maintains it corrected the defects at its own expense.

After La Cresta Engineering sued Porrazzo, Porrazzo filed a cross-complaint against Barton for breach of contract and other causes of action. In response, Barton filed a cross-complaint against Porrazzo for breach of contract and other causes of action.

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[2] Porrazzo Corporation doing business as Performance Concrete.

After a court trial, the court ruled Porrazzo had not breached the contracts with Barton because of a delay in performance. The court also ruled Porrazzo was entitled to recover the balance due on the curb and gutter contract. As to the grading contract, the court ruled there was no meeting of the minds as to the meaning of the phrase "not to exceed $16,000." Although the grading contract was not enforceable, based on a theory of quantum meruit, Porrazzo was entitled to recover the value of the grading work performed. Finally, the court denied Porrazzo penalties under Business and Professions Code section 7108.5 but ruled Porrazzo could foreclose against Barton on a mechanic's lien.

3. No Implied Waiver of Barton's Right to Appeal

After the court awarded judgment in favor of Porrazzo, Barton apparently intended "to satisfy the Judgment and yet preserve the right to appeal." Barton tendered a $152,000 check to Porrazzo with a handwritten notation: "endorsement by recipient acknowledges payment of judgment not by way of compromise or under threatened execution or other coercion and without waiver by Barton Properties Inc., Montan Inc., or Performance Concrete of any right to appeal Judgment or any order." Porrazzo apparently struck that language before negotiating the check. On appeal, Porrazzo now asserts that a party who voluntarily satisfies part of a judgment impliedly waives the right to appeal, citing *Rancho Solano Master Assn. v. Amos & Andrews, Inc.*[3]

[3] *Rancho Solano Master Assn. v. Amos & Andrews, Inc.* (2002) 97 Cal.App.4th 681, 688-691.

Generally, ". . . a waiver will be implied where there is *voluntary compliance* with a judgment, as when the judgment debtor satisfies the judgment by making payment to the prevailing party under its terms. [Citations.] Again, the waiver rule as applied in this context is also subject to an exception. A waiver of the appeal right occurs only where the compliance was '. . . by way of compromise or with an agreement not to take or prosecute an appeal." [Citations.] Thus where compliance arises under compulsion of risk or forfeiture, a waiver will not be implied."[4]

Furthermore, "[p]artial payment of a judgment does not waive the right to appeal. '"[P]ayment of a judgment must be regarded as compulsory, and therefore as not releasing errors, [nor depriving the payor of his right to appeal or] unless payment be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination." [Citation.]'"[5] Finally, in a doubtful case, the law favors the right of appeal.[6]

Applying these principles, we hold no implied waiver occurred here. This is not like the *Rancho Solana* case in which the payment of judgment was made pursuant to a voluntary settlement. Barton's payment of $152,000 was not made according to a compromise or settlement or under an agreement not to appeal. To the contrary, Barton

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[4] *Lee v. Brown* (1976) 18 Cal.3d 110, 115-116.

[5] *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745.

[6] *Lee v. Brown, supra,* 18 Cal.3d at pages 115-116.

tried to preserve, albeit somewhat clumsily, the right to appeal, Barton did not waive its right to appeal.

4. Licensure

Concerning the issue of licensure, Barton's primary argument is Pozzarro did not have the proper "C-8" and "C-12" licenses to do concrete or paving work and therefore could not recover damages for that work.[7] Pozzarro asserts it was properly licensed and, furthermore, Barton did not controvert the issue of licensure until raising it in a post-trial brief.

Business and Professions Code section 7031 provides: "(a) . . . no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person, . . . [¶] . . . [¶]

"(d) If licensure or proper licensure is controverted, then proof of licensure pursuant to this section shall be made by production of a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all

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[7] Business and Professions Code sections 143 and 7031; *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995.

*[footnote continued on next page]*

times during the performance of any act or contract covered by the action. Nothing herein shall require any person or entity controverting licensure or proper licensure to produce a verified certificate. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee."

In principal, we do not disagree with most of the 25 pages of briefing presented by Barton on this issue. But we reject Barton's premise that a "B" licensee cannot perform specialty work like curbs and paving. Instead, we agree with Porrazzo that such work is allowed under section 7057, expressly permitting a "B" licensee to accept contracts requiring use of two or more unrelated trades, as was the situation here. Furthermore, the record shows licensure was not controverted. On review, we employ the substantial evidence test because the question is primarily factual.[8]

In its cross-complaint, Porrazzo alleged it was "properly licensed to perform the construction work in issue." Although Barton filed a general denial to Porrazzo's complaint, it did not raise lack of licensure or proper licensure as an affirmative defense.

At trial, Porrazzo testified to having a general contractor's or "B" license. William Porrazzo also said he was not a grading contractor. But there was no testimony or evidence about whether Porrazzo possessed a "C-8" license for curb and gutter work

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[8] *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *Mar Shee v. Maryland Assur. Corp.* (1922) 190 Cal. 1.

or a "C-12" license for paving work.[9] Nevertheless, in its written closing argument, Barton first raised the issue of the "C-8" and "C-12" licenses.

On this point the trial court in its statement of decision said: "Here, at no time prior to submission of its closing brief did Barton challenge or attempt to controvert Porrazzo's license. In particular, Barton has never previously claimed that Porrazzo was required to establish that the contract involved at least two unrelated building trades or that it held C-8 and C-12 licenses. Since the matter is now closed to evidence, it is too late for Barton to challenge Porrazzo's license."

Based on the record, we agree with the trial court that Barton did not controvert Porrazzo's licensure. More was required from Barton than a general denial of a boilerplate allegation. Barton could have challenged licensure by summary proceedings.[10] Or Barton could have raised the issue of licensure as a new matter by an affirmative defense[11] and by establishing at trial whether Porrazzo had a "C-8" or "C-10" license in addition to the "B" license.[12] Had Barton done so, then unquestionably the

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[9] California Code of Regulations, Title 16, sections 832.08 and 832.10.

[10] *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1259-1260; *K & K Services, Inc. v. City of Irwindale* (1996) 47 Cal.App.4th 818, 822.

[11] *K & K Services, Inc. v. City of Irwindale, supra,* 47 Cal.App.4th at page 822; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 381-383; *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 566.

[12] *Buzgheia v. Leasco Sierra Grove, supra,* 60 Cal.App.4th at pages 381-383.

burden of producing evidence and the burden of proof would have fallen on Porrazzo. But to assert the defense of no licensure as a post-trial afterthought, relying on an evidentiary vacuum rather than evidence, did not suffice to controvert licensure. Therefore, Porrazzo was not barred from recovery because it did not have a "C-8" or "C-12" license, a fact that was never established at trial.

5. Delay Damages

Both form contracts contained a provision that time was of the essence. The grading contract stated "ASAP" as the completion date. The curb and paving contract did not specify a completion date. Barton sued for delay damages and the trial court denied them because it ruled neither contract specified a completion date and there was no other evidence regarding the issue of completion such as would make Porrazzo liable for delay.

A written contract is construed against the party who drafted it,[13] in this case, Barton. We review the trial court's factual determinations relative to these issues according to the substantial-evidence standard.[14] We must defer to the lower court's findings that the contracts did not have completion dates.

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[13] *Baker v. Sadick* (1984) 162 Cal.App.3d 618, 625; *Player v. Geo. M. Brewster & Son, Inc.* (1971) 18 Cal.App.3d 526, 533.

[14] *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427.

In the absence of a completion date or a performance schedule, there can be no delay damages because the damages cannot be measured.[15] This self-evident proposition is not refuted by the existence of other contractual provisions requiring that the work contracted for meet relevant codes and pass inspections.

Nor does Barton supply pertinent legal argument or point to relevant evidence supporting its contention it is entitled to delay damages based on an implied "reasonable" date of completion. We also reject as unsupported the balance of Barton's melange of arguments as to why it should receive delay damages, including its reliance on its claims for indemnity and negligence and for defective work that was ultimately repaired and its reliance on other unrelated contractual provisions.

6. Porrazzo's Appeal

Relying on Civil Code sections 3260 and 3260.1, Business and Professions Code section 7108.5,[16] and *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.*.[17] Porrazzo seeks to recover penalties from Barton for withholding progress payments. All three statutes allow a 2 percent penalty for withholding construction contract payments unless a bona fide or good faith dispute exists between the parties.

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[15] *Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 52, 54-55.

[16] The statutory references in this part of the opinion are to Civil Code sections 3260 and 3260.1 and Business and Professions Code section 7108.5.

[17] *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.* (2001) 89 Cal.App.4th 1221, 1241.

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According to the figures provided by Porrazzo, Barton paid $46,142.95 to Porrazzo on an obligation of $161,997.76 for the curb and gutter work. Porrazzo contends Barton owes penalties on the remaining $115,744.81.

Porrazzo acknowledges the relationship between Barton and Porrazzo is owner and contractor. Porrazzo has not supplied any evidence from the record to show that retention proceeds are involved. Therefore, as Porrazzo also acknowledges, the dispute between Barton and Porrazzo necessarily involves progress payments. Business and Professions Code section 7108.5, which applies to disputes about progress payments between contractors and subcontractors under the Contractors' State License Law, does not apply.[18] Part of Civil Code section 3260 does not apply because it involves an owner or contractor withholding retention proceeds from a contractor or subcontractor. The case of *Denver D. Darling, Inc.*, a case involving Civil Code section 3260 and a dispute between a contractor and subcontractor about retention proceeds, also does not directly control. Rather, the applicable code sections are Civil Code section 3260.1 and subdivision (g) of section 3260, as incorporated by section 3260.1, concerning an owner withholding progress payments.

Civil Code section 3260.1, subdivision (b), provides:

"Except as otherwise agreed in writing, the owner shall pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the

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contract, any progress payment due thereunder as to which there is no good faith dispute between the parties. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the penalty specified in subdivision (g) of Section 3260."

Section 3260, subdivision (g) provides:

"(g) [T]he owner or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs."

In its statement of decision, the court summarized section Business and Professions Code section 7108.5 and stated: "On its face, this provision does not appear to be applicable to this case but even assuming it is, the court finds there was a good faith dispute regarding the amount, if any, owed under either contract. In connection with the $16,000.00 grading contract, there was the dispute regarding whether the 'not to exceed' provision was a maximum amount due to Porrazzo or only an agreement that when that amount is reached, the parties would re-evaluate how much it will cost to complete the grading. Additionally there were disputes regarding the correction to the curb and gutter

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**18** Business and Professions Code section 7000 et seq.

work being done under the curb and gutter contract and which party was responsible for those corrections. Finally there was a good faith dispute as to whether Barton/Montan was entitled to an offset for delay damage under either contract." The trial court did not consider expressly the applicability of Civil Code sections 3260 and 3260.1 in its statement of decision but it denied Porrazzo's motion for fees and penalties, which had relied on Civil Code sections 3260 and 3260.1 and Business and Professions Code section 7108.5.

Again we defer to the trial court's factual findings for which the record offers substantial evidence. The trial court decided there was a legitimate dispute between Barton and Porrazzo. Certainly, the record supports that conclusion. In addition to the confusion about whether the grading contract was for a maximum of $16,000 or an estimate of $16,000, there was also a dispute about the adequacy of curb and gutter work and the legitimacy of Barton's delay claims. We uphold the trial court's express and implied findings about there being a good faith dispute.

Porrazzo incorrectly argues that, under Civil Code section 3260, subdivision (f), and Business and Professions Code section 7108.5 and *Denver D. Darling, Inc.*, Barton had to estimate the disputed amounts before withholding progress payments. But Civil Code section 3260.1 does not impose such a requirement on the owner. Instead, it requires a demand be made by the contractor to the owner and there be the absence of a good faith dispute. On appeal, Porrazzo does not demonstrate how the record shows Porrazzo made a demand for payment in accordance with the contract or that the dispute

between the parties was not in good faith as required by Civil Code section 3260.1. Therefore, Barton could properly withhold the progress payments in an amount not to exceed 150 percent of the disputed amount. In this case, the full contract amount for the curb and gutter work was disputed and Barton withheld less than the full amount. Porrazzo was not entitled to the 2 percent statutory penalty specified in subdivision (g) of Civil Code section 3260.

## 7. Disposition

The judgment is affirmed. The parties shall bear their own costs on appeal.

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/s/ Gaut
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.